



NATIONAL INDIAN GAMING ASSOCIATION

Rebuilding Communities Through Indian Self-Reliance

April 15, 2010

Comments on Draft National Environmental Policy Act Manual
National Indian Gaming Commission
1441 L St. NW – Suite 9100
Washington, D.C. 20005

Attn: Brian Mehaffey
NEPA Compliance Officer

Dear Chairman Skibine and Commissioner Cochran:

The National Indian Gaming Association (NIGA) is a non-profit organization of 184 Indian Nations with other non-voting associate members representing organizations, tribes and businesses engaged in tribal gaming enterprises from around the country. This letter provides the comments of NIGA on the National Indian Gaming Commission's (NIGC) Draft National Environmental Policy Act Manual (Draft Manual).

The Draft Manual was published in the Federal Register of December 4, 2009; the comment period, with extensions, closes on April 15, 2010. We note that comment periods of this length, including the extended periods, are invariably necessary to address adequately proposals with heavy procedural content and issues requiring substantial legal research. As a policy matter, it would be more productive for the NIGC to initially provide for longer comment periods rather than needing to resort to multiple extensions.

Our review of the Draft Manual finds it deficient in a number of regards. First, the manual reflects the NIGC's tendency to ignore tribal sovereignty and capabilities. Tribes involved in gaming gain great expertise in all aspects of the development, operation, and regulation of gaming facilities and operations. The NIGC's own government to government policy calls for recognition of tribal sovereignty, consultation, and collaboration; this policy should be reflected in the Draft Manual. We propose three provisions that would be more effective in implementing the NIGC's government to government policy in the NEPA context:

1. Tribal governments normally should have joint lead agency status when Environmental Impact Statements or Environmental Assessments are deemed necessary;
2. Tribal governments should have a major role in the selection of EIS contractors;
and

3. The NIGC should include tribal government coordination in its emergency provisions.

Second, the NIGC should conclude that management contracts do not trigger NEPA review except in the most unusual circumstances. We conclude that this is the proper approach based on the following:

1. The time limitations in the Indian Gaming Regulatory Act (IGRA) preclude the preparation of Environmental Impact Statements and warrant the conclusion that there is a statutory conflict with NEPA;
2. Substantively, management contract approvals are not major federal actions and warrant categorical exclusion from NEPA review;
3. The NIGC's own experience with NEPA compliance demonstrates that management contract determinations do not significantly affect the human environment and warrant categorical exclusion from NEPA review; and
4. IGRA does not grant to the NIGC authority to deny management contract proposals based on environmental grounds except in the most narrow and unusual (probably nonexistent) circumstances, warranting a conclusion that there is a statutory conflict and grounds for categorical exclusion.

As a final point concerning NIGC's categorical exclusion under NEPA, there is a clear factual record that such approvals do not have significant environmental effects. According to the NIGC's website, between 1994 and 2009 the NIGC approved 27 Findings of No Significant Impact (FONSIs), while denying none. (*See* <http://www.nigc.gov/EnvironmentPublicHealthSafety/NEPACompliance/tabid/719/Default.aspx>). The only instance where an EIS was prepared appears to have been one prepared by the BIA unrelated to NIGC's management contract approval authority, but which was used by the NIGC for purposes of signing a record of decision concluding that the management contract could be approved.

The NIGC's continued requirement of an EIS when reviewing management contracts is a significant detriment to the conservation of Tribal resources, and a clear waste of the management contractors' and NIGC's time and money. The NIGC should conclude on both statutory and categorical exclusion grounds that NEPA coverage for management contracts is not required.

These conclusions are supported and technical comments provided in the attachment to this letter.

Sincerely yours,

A handwritten signature in black ink that reads "Mark Van Norman". The signature is written in a cursive, flowing style with a large initial 'M'.

Mark Van Norman
Executive Director

Attachment: Comments of the National Indian Gaming Association on the National Indian Gaming Commission's Draft Manual for the National Environmental Policy Act

**Comments of the National Indian Gaming Association
on the National Indian Gaming Commission's
Draft Manual for the National Environmental Policy Act**

April 15, 2010

The National Indian Gaming Association (NIGA) is pleased to provide comments on the National Indian Gaming Commission's (NIGC) Draft National Environmental Policy Act Manual (Draft Manual), published in the Federal Register on December 4, 2009.

Government to Government Policy Issues: Our review of the Draft Manual finds it deficient in Government to Government policy issues. First, the manual ignores tribal sovereignty and tribal government capabilities. Tribes involved in gaming gain great expertise in all aspects of the development, operation, and regulation of gaming facilities and operations. Additionally, the government to government relationship between the NIGC and tribes, per written NIGC policy, calls for recognition of tribal sovereignty, consultation, and collaboration; this policy should be reflected in the Draft Manual. We propose three provisions that would be more effective in implementing the NIGC's government to government policy in the NEPA context:

1. Tribal governments normally should have joint lead agency status when Environmental Impact Statements or Environmental Assessments are deemed necessary;
2. Tribal governments should have a major role in the selection of EIS contractors; and
3. The NIGC should include tribal government coordination in its emergency provisions.

Statutory Conflict and Categorical Exclusion Issues: Second, from a policy, legal, and practical standpoint, the NIGC should conclude that management contracts need not trigger NEPA review except in the most unusual circumstances. We conclude that this is the proper approach on four bases:

1. The time limitations in the Indian Gaming Regulatory Act (IGRA) preclude the preparation of Environmental Impact Statements and warrant the conclusion that there is a statutory conflict with NEPA;
2. Substantively, management contract approvals are not major federal actions and warrant categorical exclusion from NEPA review;
3. The NIGC's own experience with NEPA compliance demonstrates that management contract determinations do not significantly affect the human environment and warrant categorical exclusion from NEPA review; and
4. IGRA does not grant the NIGC authority to deny management contract proposals based on environmental grounds except in the most narrow and unusual (and probably nonexistent) circumstances, warranting a conclusion that there is a statutory conflict and grounds for categorical exclusion.

From a practical perspective, we note in our comments that the NIGC has prepared 27 Findings of No Significant Impact based on Environmental Assessments and one Record of Decision based on a Bureau of Indian Affairs Environmental Impact Statement prepared for other purposes in concluding over the past sixteen years that management contracts have no significant effects on the human environment. To continue to require preparation of such documents is a clear waste of tribal, management contractor, and NIGC money and time. It is also an abuse of process. The NIGC should conclude on both statutory conflict and categorical exclusion grounds that NEPA coverage for management contracts is not required.

These two broad comment categories are supported and explained below. Additionally, more technical comments are provided in a final section.

I. Government to Government Policy Issues: The NIGC should provide greater recognition in its NEPA manual of tribal capabilities and sovereignty in dealing with tribes on a government to government basis and involving them in the NEPA process.

As described in the introduction to these comments, the NIGC's Draft Manual reflects insufficient recognition of tribes' sovereignty, despite NIGC policies that promote government to government relationships with tribes. The effects are to limit the involvement in the process by tribes, which are the most affected entities by the ultimate decision on a management contract, as well as NIGC's opportunities to capitalize on tribal capabilities and their understanding of the environment that could be affected by an approval or disapproval decision. We propose that the NIGC take three actions as presented below to address this concern.

A. Tribal governments normally should have joint lead agency status when Environmental Impact Statements or Environmental Assessments are deemed necessary.

The Draft Manual assumes that the NIGC or the Bureau of Indian Affairs (BIA) will always act as lead agency in conducting or drafting an EA or EIS, offering tribes the opportunity to become cooperating agencies. See § 5.2.1. Tribes do not need to be limited to a cooperating role. CEQ regulations expressly allow Indian tribes to serve as joint lead agencies. "Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (Sec. 1506.2)." 40 C.F.R. § 1501.5(b). The Environmental Protection Agency website is even more explicit in its Frequently Asked Questions section, answering the question, "What are the roles of federal agencies in the NEPA process" with, in part: "Federal agencies, together with state, tribal or local agencies, may act as joint lead agencies." Environmental Protection Agency, Frequently Asked Questions, National Environmental Policy Act, <http://www.epa.gov/compliance/resources/faqs/nepa/index.html> (last visited Jan. 28, 2010). The Department of the Interior's BIA NEPA Handbook likewise recognizes that tribes can serve a leading role. NEPA Handbook, 59 IAM 3-H § 2.4.C.

There is no reason that the NIGC should not allow Indian tribes to act as joint lead agencies, especially as the only instance which the agency has identified as necessitating NEPA review is its approval of gaming operation management contracts between tribes and third parties. Respect for tribal sovereignty and self-determination should rather lead the NIGC to assume that the tribal proponent(s) of the project will act as a joint lead agency unless the tribe declines. The Commission may offer potentially affected tribes, states, and local governments the opportunity to become cooperating agencies. The Draft Manual, and especially the Memorandum of Understanding provisions of Appendix B, should be revised accordingly.

B. Tribal governments should have a major role in the selection of EIS contractors.

The Draft Manual also minimizes a tribe's role in helping to select an EIS preparation contractor, which displays a paternalistic approach that is inconsistent with modern Indian policy. The NIGC indicates that in order to avoid any appearance of a conflict of interest, the NIGC will review and evaluate each proposal and select a contractor. Appendix C § C-2. The Draft Manual does not explain how requests for proposals will be solicited. It merely provides that "[i]t may be necessary for the NIGC to consult with the Tribe to identify prospective contractors." *Id.*

While obtaining an objective report relative to a project is an appropriate objective, here the agency has excessively excluded tribes from the process. The NIGC provides only what appears to be a begrudging acceptance of the fact that consultation with the tribe may be necessary. *Id.* Other agencies, even within Interior, have managed to retain independent contractors to prepare an EIS while systematically including the proponent of the project in at least part of the selection process. The Department's Bureau of Land Management, for example, allows the proponent of a project to submit "in order of preference, three third-party consultants you feel are qualified to prepare an EA[EIS] analyzing the impacts of the proposed project." Bureau of Land Management Utah NEPA Guidebook, Updated Version July 2009, Appendix 4 – Third Party Contracting BLM's Request for Recommended Contractors (available at http://www.blm.gov/pgdata/etc/medialib/blm/ut/natural_resources/nepa/on-line_nepa_guidebook.Par.28309.File.dat/Utah_NEPA_Guidebook_July_2009.pdf). The FAA also allows the non-federal party to submit a "short list" of contractors based upon its request for proposals and evaluation of the responses.

The NIGC may not need to select a contractor solely from a list prepared by the proponent tribe, but could allow the tribe to submit a few options or request a preference for Native American-owned firms, and should always consult with the Tribe on the contractors that have submitted requests for proposals. It is not inconceivable that a tribe would ask the NIGC to exclude a contractor from consideration based upon review of prior experience of that tribe with the contractor or the contractor's past history with other tribes or projects.

C. The NIGC should include tribal government coordination in its emergency provisions.

Section 2.5.4 of the Draft Manual does not mention coordination or notification of tribal officials, NEPA professionals, or emergency service providers if a tribe is likely to be impacted by an emergency situation or offer these affected and competent parties participation rights in making decisions or resolving the emergency. In fact, the provision does not mention Indian tribes at all. Considering that NIGC's authority is limited to providing regulatory oversight to tribal gaming enterprises, there is an open question of whether or not the NIGC has any role to play in emergency NEPA measures. Section 2.5.4 provides as follows:

Emergency Actions: In the event of an emergency situation, the NIGC may be required to take an action to prevent or reduce the risk to the environment, public health, or safety that may impact the human environment without evaluating those impacts under NEPA. Upon learning of the emergency situation, the NIGC NEPA Compliance Officer will immediately inform [the Council on Environmental Quality (CEQ)] of the emergency situation when the proposed NIGC action is expected to result in significant impacts on the human environment. In some cases, the emergency action may be covered by an existing NEPA analysis or an exemption. In other cases, it may not be covered. In these cases, the NIGC NEPA Compliance Officer (in consultation with CEQ) will obtain guidance on NEPA compliance. The NIGC NEPA Compliance Officer will provide continued follow-up consultation with CEQ throughout the duration of the emergency situation. The provisions of this section do not apply to actions taken after the emergency situation has been resolved or those related to recovery operations.

In cases where the NIGC proposed action is not expected to result in significant impacts on the human environment, the NIGC NEPA Compliance Officer shall ensure the appropriate NEPA documentation (CATEX or EA) is prepared following the actions required to control the emergency and before any follow-up actions are taken.

The Draft Manual should be revised to mandate contact and notification be made to the tribal leader and tribal emergency service providers, if the information came from another source outside of the Tribal government. Further, the NIGC NEPA Officer should offer the tribe the opportunity to send a representative to the meeting or phone conference with CEQ to provide input and guidance.

While we understand that this provision addresses emergencies, a conference call to CEQ with the tribe on the line is unlikely to cause unreasonable delay and might well expedite appropriate response. An emergency as discussed in this manual entails not a truly imminent exigency such as a forest fire, but rather a pressing situation that cannot wait for detailed EIS studies and public comment and revisions before action is taken, such as the need to shore up a retaining wall without which buildings would be in danger of

collapse. The tribe's assistance would likely be invaluable, even in the case of true exigency, because it is far better placed to provide information on local conditions, road and air accessibility, nearby non-tribal emergency services personnel, and the like.

Likewise, it would not be an undue burden for the NIGC NEPA Compliance Officer to coordinate with tribal leaders as well as the CEQ throughout the duration of the emergency. In fact, the manual should provide that NIGC will coordinate with the appropriate tribe or tribes, and include them in decision-making to the fullest extent that the situation allows. It is extremely likely that the tribe, not the NIGC, would be the entity implementing the solution, hiring contractors or directing its employees to effect repairs, and supervising the remedy of the emergency situation. The Draft Manual should therefore reflect reality and view the NIGC's role in an emergency as assisting a sovereign tribal nation to coordinate with Federal bureaucracy to solve the problem rather than as wresting control from the tribe to impose top-down Federal orders and mandates. (emphasis added).

II. Statutory Conflict and Categorical Exclusion Issues: NIGC should include management contract approvals in its list of NIGC statutory requirements which conflict with NEPA and for which the NIGC does not need to comply with NEPA, or should categorically exclude them from NEPA review.

In Section 2.5.5 of the Draft Manual, the NIGC has properly identified the NIGC's action of approving gaming ordinances as being statutorily inconsistent with NEPA, and therefore not requiring NEPA compliance. The justification is that § 2710 of IGRA requires that tribal gaming ordinances be approved within 90 days of submission, and it is entirely clear that an EIS on a tribal gaming ordinance could not be completed within that short a period. However, the Draft Manual, consistent with current NIGC policy, treats management contract approvals as federal actions requiring NEPA compliance. We believe that management contract approvals under IGRA do not warrant NEPA review for four reasons as described below. In addition, we believe the case for not preparing EISs is so strong legally on bases of statutory conflict and categorical exclusion and the experience to date so unequivocal that continuing to require NEPA compliance for management contracts is a waste of tribal, management contractor and NIGC money and time and rises to an abuse of process. We do note under a separate heading that it may be appropriate for the NIGC to prepare a programmatic EIS on its procedures for making decisions to approve or disapprove management contracts.

A. The time limitations in IGRA preclude the preparation of EISs and warrant the conclusion that there is a statutory conflict with NEPA.

While federal agencies are to comply with NEPA "to the fullest extent possible", 42 U.S.C. § 4332, compliance is excused when a statutory conflict within the agency's authorizing legislation renders NEPA review impossible. *See* H.R. Conf. Rep. No. 91-765, 91st Cong., 1st Sess. (1969), *reprinted in* 1969 U.S.C.C.A.N. 2767, 2770; *see also* *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976). The NIGC failed

to consider the applicability of this exception to NEPA for management contract approvals when creating the Draft Manual, and should rectify that omission.

Section 2.5.5 of the Draft Manual addresses statutory conflicts and properly identifies approval of tribal gaming ordinances as a category of NIGC actions where the statutory requirement in the Indian Gaming Regulatory Act (IGRA) is inconsistent with NEPA. 2.5.5.1. This conflict occurs because IGRA requires that the NIGC Chairman approve or disapprove an ordinance submitted to the Commission within ninety (90) days or the ordinance will be deemed approved. 25 U.S.C. § 2710(e). This ninety-day period is far too short for the agency to prepare an Environmental Impact Statement (EIS), with its concomitant public comment period for the Draft Environmental Impact Statement (DEIS), review and revision in response to feedback, and publication of a Final Environmental Impact Statement (FEIS), even assuming that no supplemental DEIS is needed. Using the same reasoning, the NIGC should list management contract approvals as having a statutory conflict negating the Commission's responsibility to comply with NEPA. The NIGC must approve or disapprove a gaming management contract within one hundred and eighty (180) days, with a possible ninety (90) day extension, or a tribe may sue to compel action. 25 U.S.C. § 2711(d).

The NEPA conference committee reports make clear Congressional intent that agencies not attempt to avoid NEPA compliance through excessively narrow constructions of their statutory authorizations. Conference Report, 115 Cong. Rec. (Part 29) 39702-703 (1969), quoted in *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971). ("Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102.... [N]o agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance."). Nevertheless, the Supreme Court has found that NEPA compliance is not required where there is a "clear and unavoidable conflict in statutory authority." *Flint Ridge*, 426 U.S. at 788-89.

In *Flint Ridge*, NEPA was deemed inapplicable as there was an "irreconcilable and fundamental conflict with the Secretary's duties under the [Interstate Land Sales Full Disclosure] Act" because statements of record had to go into effect within 30 days of filing, absent inaccurate or incomplete information, and it would be impossible to simultaneously prepare Environmental Impact Statements on the proposed developments. *Id.* Therefore, the Supreme Court held that, when a "clear an unavoidable conflict in statutory authority exists, NEPA must give way . . . NEPA was not intended to repeal by implication any other statute." *Id.* at 788 (internal citation omitted). The proper test was "whether, assuming an environmental impact statement would otherwise be required in this case, requiring the Secretary to prepare such a statement would create an irreconcilable and fundamental conflict with the Secretary's duties." *Id.* We submit that the six to nine month statutory review period allowed the NIGC for management contracts is *prima facie* too short to allow the agency to create an EIS.

The average time for completion of an EIS is 3.4-3.6 years. *Minard Run Oil Co. v. U.S. Forest Service*, 2009 WL 4937785, at *13 (W.D. Pa. Dec. 15, 2009) (citing Piet deWitt and Carole A. deWitt, *How Long Does It Take to Prepare an Environmental Impact Statement?*, 10 Env'tl. Prac. 164-174 (2008) (finding the average time of 3.4 years for preparation of an EIS based on the time between the publication of the Notice of Intent in the Federal Register and the Environmental Protection Agency's Notice of Availability of the Final EIS in a study of 2,095 EISs prepared by 53 different federal agencies); *see also* Larson, Krieg, et al., Federal Highway Administration, *Evaluating the Performance of Environmental Streamlining: Development of a NEPA Baseline for Measuring Continuous Performance* (2000), available at <http://www.environment/fhwa/dot.gov/strmlng/baseline/index.asp> (finding EISs take an average of 3.6 years to complete using the signing date of the Notice of Intent as a start point and the signing date of the Record of Decision as an end point). Further, once the Draft EIS has been completed, a federal agency cannot make a decision based on a DEIS until ninety (90) days after publication of a Notice of Availability of the DEIS or thirty (30) days after publication of a Notice of Availability of a FEIS, whichever is later. 42 C.F.R. § 1506.10(b). The minimum public comment period for EIS review is forty-five (45) days. *Id.* at § 1506.10(c). If the agency holds a public hearing for the public to consider the DEIS, it must give fifteen (15) days prior notice. *Id.* at § 1506.6(c)(2). Management contract review and approvals thus present a statutory conflict with NEPA that merit categorical exclusion from the NEPA review process.

The NIGC's six month deadline, or even the nine months allowed with an extension, is considerably shorter than those of other statutes where the courts did not excuse NEPA compliance. *See Forelows on Board v. Johnson*, 743 F.2d 677, 685 (9th Cir. 1985) (one year, nine month period to offer contracts); *Westlands Water Dist. v. U.S. Dept. of Interior*, 275 F. Supp. 2d 1157 (E.D.Cal.,2002) (four years is sufficient time to create an EIS). In addition, the IGRA's legislative history does not mention NEPA compliance, or even refer to environmental concerns. *See Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201 (C.A. Tex. 1978) (two year period to develop a forest management plan did not constitute a conflict because the pertinent statute's legislative history mandated NEPA compliance).

Even if the NIGC extended the deadline to the statutory limit of nine months, there is still insufficient time for the agency to complete the EIS process. By the time a management contract application is received, contractors hired, the project scoped, a DEIS prepared, a period for comments and possible public hearings allowed, comments evaluated and addressed in an FEIS, and a record of decision created, more than nine months will have elapsed under the best of circumstances.

While exceptions for Council of Environmental Quality regulatory minimum times for public comment and delay of decision at the end of the process are allowed (see exceptions to the CEQ minimum time limits under sections 1507.3(b), (d)), it is still unlikely that the NIGC could complete an EIS in the maximum nine month period. For instance, on the one occasion when an EIS was used by the NIGC, that EIS was prepared under court order by the Bureau of Indian Affairs on the fee to trust and Section 20

actions involved in a proposal and took approximately two years and three months to prepare; the NIGC appears to have taken another 18 months to prepare the record of decision on the management contract.¹

Even when the NIGC simply prepares an Environmental Assessment (EA), the nine-month limit appears to be too short a time for completing and taking action on the EA. For instance, the NIGC's most recent Finding of No Significant Impact on an EA took nine months from the time the draft EA was released for public comment to approval, which doesn't account for the time required for any of the preceding work including hiring contractors, conducting scoping, and preparing the draft EA.² The NIGC NEPA Manual should therefore list management contract approvals as excused from NEPA compliance due to statutory conflict. While not a statutory requirement, it should be noted that these time periods also are not adequate for the NIGC to consult with Indian tribes pursuant to the Commission's government-to-government consultation policy.

B. Substantively, management contract approvals are not major federal actions and warrant categorical exclusion from NEPA Review.

An examination of the NIGC's activity in approving management contracts reveals that their approval does not constitute a major federal action necessitating NEPA review. The federal government should not place an undue regulatory burden on Indian tribes by unduly involving itself in contracts that are between two non-federal parties beyond the degree it must as set forth in IGRA.

NEPA was enacted to assist Federal agencies in ensuring that significant environmental impacts are considered in the Federal decision-making process and are communicated to the public along with mitigation decisions, thus guaranteeing that relevant information is available to the public who may provide input into the decision-making process and the implementation of the agency decision. 42 U.S.C. § 4332; *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). Thus, an EIS should be created only when the agency will be "undertaking an activity that rises to the level of a major federal action which significantly affects the quality of the human environment." *Department of Transportation v. Public Citizen*, 541 U.S. 752, 763 (2004) (internal citation omitted). 40 C.F.R. § 1508.18 defines the term major federal action:

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (Sec.

¹ See Record of Decision, Approval of Management Contract for Gaming Facility at the 79-acre Former Sackrider Site (Parcel H) in Calhoun County, Michigan, for the Nottawaseppi Huron Band of Potawatomi Indians (December 14, 2007) at 2-3 (available on the NIGC website).

² See NIGC, Final Environmental Assessment and Tribal Environmental Impact Report for the Pauma Casino and Hotel (May 5, 2008) at 2, 4 (available on the NIGC website). The FEA does not indicate when the management contract application was received. It would be helpful if NIGC followed a practice of including the date of receipt of such applications in its FONSI.

1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (Secs. 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

* * * *

4. Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

The NIGC's approval of a management contract, covering a specific project located in a defined location involving activity that may be regulated by the Commission, appears at first blush to meet CEQ's definition of a major federal action in subsection 1508.18(b)4. However, the approval provisions of subsection (b) may be read as interpreting the general statement of subsection (a). Subsection (a) clarifies, in pertinent part, that it applies to projects or programs "entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies". Close examination shows that the federal interest in a management contract, other than for enforcement of its terms, is slim. Gaming, the regulated activity, may take place with or without the contract. For Class III gaming, there is federal oversight rather than regulation of the gaming activity. *Colorado River Indian Tribes v. NIGC*, *Colorado River Indian Tribes v. NIGC*, 466 F.3d, 134 (D.C. Cir. 2006).

The parties entering into the management contract are both non-federal actors simply defining how they will interact, allocate responsibilities, and allocate income; the Commission's authority to review management contract provisions is aimed at keeping organized crime out of Indian gaming and ensuring that the fee provisions are not unreasonable. 25 U.S.C. § 2704(2). The NIGC's approval is often of a project with no construction activity, as evidenced by the NIGC's proposed Category 3 categorical exclusion for approval of these management contracts as part of the Draft Manual. 3.3.3.

Indian tribes had the authority to build and operate gaming facilities on their reservations, and likely in Indian Country, prior to the enactment of the IGRA. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 1083, 1094-95 (1987). Under the IGRA, an

Indian tribe has the right to build and operate a gaming facility on its lands once it adopts a gaming ordinance that receives the approval of the NIGC Chairman; no federal review of the construction design, location, or site, if there is to be construction of a facility, is required other than a possible ministerial need for an opinion that the selected site qualifies as Indian lands. *See* 25 U.S.C. § 2719; 25 C.F.R. § 292.

Moreover, a management contract for Class III gaming activities is a project between two non-federal actors. “A project conducted by non-federal actors, such as oil and gas drilling by private parties, will only trigger NEPA if it requires a federal agency to undertake ‘affirmative conduct’ before the non-federal actor may act.” *Mineral Policy Center*, 292 F. Supp. 2d at 54-55, n. 31 (D.D.C. 2003) (citing *State of Alaska v. Andrus*, 429 F. Supp. 958, 962-63 (D. Alaska 1977)).

AS previously described, when a management contract incidentally does involve construction activity, the NIGC has no ability to control or regulate the size, design, or construction of the project. The NIGC’s authority to approve and enforce management contracts for Indian casinos is very limited in the scope of its review. 25 U.S.C. § 2710 § 2711. Congress directed the Commission to examine the background of each person or entity with a financial interest or management responsibility in the contract; ensure certain accounting, tribal access provisions, and time limits are in the contract; and determine that the fee provisions are reasonable. 25 U.S.C. § 2711(a)-(c).

If a contract is approved, the NIGC Chairman has the authority to modify or void the contract and to enforce its terms. 25 U.S.C. §§ 2712, 2706(b), 2713. In fact, the only real estate provision in the management contract authority of IGRA is simply a mandatory requirement that the Chairman may not approve a management contract that “shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.” *Id.* at § 2711(g). IGRA’s text and its legislative history do not once mention NEPA compliance and give the NIGC no legal authority to deny a management contract based on the environmental impacts of a facility that would be operated by the management contractor. *See* 25 U.S.C. § 2711, which limits the disapproval of a management contract to a limited number of bases, none of which involve the scope or impact of the facility to be operated.

Thus, in view of the NIGC’s limited role in management contract review and approval, the question should be focused on whether the NIGC’s level of involvement in the activity underlying its approval rises to the level of major federal action. *See Save Barton Creek Ass’n v. Fed. Highway Admin.*, 950 F.2d 1129, 1133 (5th Cir.1992) (“The requirements of NEPA, which include, among other things, the submission of an EIS, apply only when the federal government’s involvement in a project is sufficient to constitute ‘major federal action.’”).

Despite the passage of decades since the enactment of NEPA, “no litmus test exists to determine what constitutes major ‘federal action,’ *Save Barton Creek*, 950 F.2d at 1134, as “federal courts have not agreed on the amount of federal involvement necessary to

trigger the applicability of NEPA.” *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1480 (10th Cir. 1990). Because state and private actors are not subject to NEPA, *Macht v. Skinner*, 916 F.2d 13, 18 (D.C. Cir. 1990), the determination of whether a major federal action is involved hinges on whether a project is federal or non-federal in nature and the amount of control or influence that the federal agency can impose on the project. See *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988) (“The touchstone of major federal action ... is an agency's authority to influence significant nonfederal activity. This influence must be more than the power to give nonbinding advice to the nonfederal actor.... Rather, the federal agency must possess actual power to control the nonfederal activity.”) (overruled on other grounds); *Village of Los Ranchos de Albuquerque*, 956 F.2d at 973. See also *United States v. Southern Florida Water Mgmt. Dist.*, 28 F.3d 1563, 1572 (11th Cir. 1994) (“The touchstone of major federal activity constitutes a federal agency's authority to influence non-federal activity.”).

When non-federal activity is involved:

[T]he court shall consider the following factors: (1) whether the project is federal or non-federal; (2) whether the project receives significant federal funding; and (3) when the project is undertaken by a non-federal actor, whether the federal agency must undertake “affirmative conduct” before the non-federal actor may act. No single factor of these three is dispositive.

Mineral Policy Center v. Norton, 292 F. Supp. 2d 30, 55 (D.D.C. 2003) (internal citations omitted).

An Indian gaming management contract is not a federally initiated, operated, or owned project. The IGRA requires “the tribe to have the sole proprietary interest and responsibility for the conduct of any gaming activity. 25 U.S.C. § 2710(b)(2)(A). The tribe may begin construction of a gaming operation without any federal approval and may offer gaming activities as soon as its gaming ordinance has been approved by the NIGC Chairman. 25 U.S.C. §§ 2710(b)(1), (d)(1). An Indian gaming operation receives no federal funding; instead the tribe pays fees to the government to cover regulatory and oversight costs. 25 U.S.C. § 2717. The management contract itself is between two non-federal entities: an Indian tribe desiring to have a management company operate either a new or existing casino and the private company vying for the contract. Unapproved management contracts are void, 25 U.S.C. § 2711(a), and subject to federal criminal penalties. 18 U.S.C. § 1166.

The issue therefore comes down to the third prong of the test, whether the federal agency must undertake affirmative conduct before the non-federal actor may act, and the scope of the action.

A non-federal project may be considered a federal action “if it cannot begin or continue without prior approval of a federal agency.” *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986). On the other hand, there has been reluctance to require NEPA compliance on actions “that are marginally federal.” *State of Alaska v. Andrus*, 591 F.2d 537, 541 (9th Cir. 1979). “Where federal funding is not present, this

court has generally been unwilling to impose the NEPA requirement.” *Id.* (citing *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323 (9th Cir. 1975) (mere federal approval of aspects of airport expansion insufficient)).

Federal approval of aspects of a project does not necessarily federalize the project such that NEPA compliance is required. Several cases specifically on point involve Federal Aviation Authority (FAA) approval of airport layout plans by non-federal airport authorities, a preliminary step to federal funds being granted. *Friends of the Earth, City of Boston v. Volpe*, 464 F.2d at 254 (1st Cir. 1972). As described by the *Friends of the Earth* court, “[d]etermination of whether federal and state projects are sufficiently interrelated to constitute a single “federal action” for NEPA purposes will generally require a careful analysis of all facts and circumstances surrounding the relationship. At some point, the nexus will become so close, and the projects so intertwined, that they will require joint NEPA evaluation.” 518 F.2d at 329. The approval of airport layout plans does not require an EIS. *Friends of the Earth*, 518 F.2d at 328; *Volpe*, 464 F.2d at 259-60 (“A state may, after all, proceed with construction wholly independently of the federal government.”)

Moreover, NIGC approval of any construction or building terms in the management contract are likely approved in a ministerial nature because they are outside the scope of the Commission’s review. “If ... the agency does not have sufficient discretion to affect the outcome of [an] action, and its role is merely ministerial, the information that NEPA provides can have no affect on the agency's actions, and therefore NEPA is inapplicable.” *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C.Cir.2001).

These combined factors do not lead to a conclusion that the approval of the NIGC Chairman for a management contract necessitates NEPA compliance. No federal-tribal partnership on a joint project is involved with tribal casino management contracts. The project is non-federal and receives no federal funding. The NIGC is not in control of the project, nor may it exert significant influence on any construction or environmental mitigation terms of the gaming management contract. *Sierra Club v. Hodel*. Moreover, Indian tribes have the authority to build and operate gaming operations on their lands even without an approved management contract and no federal funding is granted by the NIGC or any other federal agency as part of or subsequent to the approval process. While the NIGC may have authority to regulate the gaming activity, the federal government’s only involvement with an approved management contract is to enforce its terms, require contract modifications or void the contract if the provisions required by IGRA are not met. 25 U.S.C. § 2711(f).

In light of these factors indicating that the NIGC has no ability to control or influence the significant nonfederal activity, it would be appropriate for the NIGC to determine that its action in approving a management contract does not rise to the level of a major federal action that requires NEPA compliance.

C. The NIGC's own experience with NEPA compliance demonstrates that management contract approvals do not significantly affect the human environment and warrant categorical exclusion from NEPA review.

As a final point concerning categorical exclusion under NEPA and section 3.3.3 of the Draft Manual of management contract approval actions taken by the Chairman, there is a clear factual record that such approvals do not have significant environmental effects. According to the NIGC's website, between 1994 and 2009 the NIGC approved 27 Findings of No Significant Impact (FONSI), while denying none. <http://www.nigc.gov/EnvironmentPublicHealthSafety/NEPACompliance/tabid/719/Default.aspx>. The only instance where an EIS was prepared appears to have been one prepared by the BIA unrelated to NIGC's management contract approval authority, but which was used by the NIGC for purposes of signing a record of decision concluding that the management contract could be approved. *Id.* identifying the signed record of decision for a management contract for the Nottawaseppi Huron Band of Potawatomi Indians. When every Environmental Assessment (EA) prepared over a 16 year period and involving such a large number of EAs results in a FONSI, there is a *prima facie* basis for concluding that management contract approvals do not have significant environmental effects.

The use of categorical exclusions under NEPA has drawn new attention with the recent announcement by the Chair of the Council on Environmental Quality (CEQ) of initiatives to modernize and reinvigorate NEPA. <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa> (February 18, 2010). The announcement included a memorandum for heads of federal departments and agencies proposing and seeking comments on new guidance to establish and apply categorical exclusions under NEPA.³ As stated in the memorandum,

A "categorical exclusion" describes a category of actions that do not typically result in individual or cumulative significant environmental effects or impacts. When appropriately established and applied, categorical exclusions serve a beneficial purpose. They allow Federal agencies to expedite the environmental review process for proposals that typically do not require more resource-intensive Environmental Assessments (EAs) or Environmental Impact Statements (EISs). *Id.* at 1.

The reason for using a categorical exclusion in the case of management contracts would be to save resources of tribes or their management contractors (which surely translate into costs passed on in some way to the gaming enterprise and lower payments for the tribe). With 27 such FEAs, undoubtedly costing millions of dollars to prepare, further expenditures can be curtailed. The CEQ guidance also provides a backstop to assure that there are no extraordinary circumstances where NEPA compliance would be appropriate.

³ Memorandum for Heads of Federal Departments and Agencies, Subject: Establishing and Applying Categorical Exclusions Under the National Environmental Policy Act <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-categorical-exclusions-draft-guidance.pdf> (February 18, 2010).

Before applying a categorical exclusion, a Federal agency reviews a proposed action to ensure there are no factors that merit analysis and require documentation in an EA or EIS. This review assesses whether there are any “extraordinary circumstances” to determine whether the application of a categorical exclusion is appropriate. Extraordinary circumstances are a required element of all Federal agency National Environmental Policy Act (NEPA) implementing procedures. *Id.* at 1-2, citing 40 C.F.R. § 1508.4.

As argued in section 1.B of this set of comments, the extraordinary circumstances that could apply would be if the Chairman concluded in his or her capacity as a trustee there was a reasonable chance that approval of a management contract would have such significant environmental effects on the tribe for which the approval is sought or on another tribe that the Chairman would have to disapprove the contract. We submit that this is never likely to occur, and that if it did, it would be rare and an extraordinary circumstance.

D. IGRA does not grant to the NIGC authority to deny management contract proposals based on environmental grounds except in the most narrow and unusual (probably nonexistent) circumstances, warranting a conclusion that there is a statutory conflict and grounds for categorical exclusion.

Section 12 of IGRA (25 U.S.C § 2711), the primary section of IGRA that establishes terms under which the NIGC can elect to approve or disapprove management contracts, makes clear that the NIGC has no authority to make such a decision on grounds for which NEPA or the preparation of an Environmental Impact Statement would be applicable. Close analysis of the section makes clear that the following are grounds for denying a management contract:

1. Under subsection (a), the Chairman of the NIGC can require certain minimal information on the persons and entities that will have a direct financial interest in or management responsibility for the management contract, including obtaining certain information on their experience related to the gaming industry and a financial statement. Persons with a direct financial interest include members of the board of directors of a corporation and stockholders who hold 10% or more of its stock. By implication, if such information is not provided, the Chairman may not approve the management contract.
2. Under subsection (b), the Chairman may approve a management contract only if he determines that it provides adequate accounting procedures, provides certain access to the tribe’s governing body, meets certain financial terms, does not exceed certain time limits, and provides the grounds and mechanism for contract termination.
3. Under subsection (c), the Chairman may approve a management contract providing for a fee based on a percentage of the net revenues of a tribal gaming activity if the fee is reasonable and within a range of 30-40% or less (amounts in excess of 30% must meet a somewhat higher financial test).

4. Under subsection (d), the Chairman must approve a management contract within 180 days, or 270 days upon notice of a reason for extending the period.
5. Under subsection (e)(1)-(3), the Chairman may not approve a management contract based on the characteristics or actions of the individuals involved in the contract such as contracts involving persons with a criminal record or persons who have unduly interfered with or influenced a tribal government relating to the gaming activity.
6. Under subsection (e)(4), the Chairman may not approve a management contract if, acting as a trustee and exercising the skill and diligence that a trustee is commonly held to, he or she would not approve the contract. An argument might be made that this opens the door to making decisions based on environmental considerations, but the provision is better read as covering financial and governance concerns. To stretch the provision to cover environmental consequences to be considered by the Chairman as a trustee would necessarily be narrowly tailored to the question of whether the environmental consequences of the management contract, if the contract addressed any activities with environmental consequences at all, would have environmental consequences that would adversely affect the tribe or another tribe, rather than the public at large.
7. Under subsections (g) and (i), the Chairman would be required to disapprove the management contract if the contract provided for the transfer of land or other real property where not authorized or clearly specified in the contract, or if the potential contractor refused to pay certain fees to cover investigative costs.

Nowhere in this list is the Chairman given the authority to disapprove a management contract based on its environmental consequences unless, in the unrealistic circumstance as identified under item 6, above, the environmental consequences of the management contract were sufficiently adverse to the tribe (or, perhaps some other tribe) that they would rise to the level of invoking the Chairman's trust responsibility to the tribe or tribes to disapprove the contract. Such an instance based on environmental circumstances would be exceedingly unlikely to occur in practice, and, based on the record of Findings of No Significant Impacts in all cases so far examined by the NIGC, has not occurred since IGRA was enacted.⁴ If the NIGC considered the environmental consequences of approving a management contract to potentially create a trust concern related to the tribe involved or some other tribe, then it could conduct a review of that narrow issue. That is insufficient grounds, however, to require all management contracts involving construction of a facility to undergo NEPA review.

E. If the NIGC concludes that some NEPA coverage of the Chairman's approval of management contracts is required, then the appropriate NIGC action is to prepare a programmatic EIS to broadly cover its decisions.

In concluding this section of the comments regarding the lack of a basis to conduct NEPA analyses, we would be remiss if we did not point out that the NIGC has another alternative approach available. Many agencies prepare Environmental Impact Statements

⁴ See NIGC website pages covering NEPA compliance and listing all approved FONSI and other NEPA actions at www.NIGC.gov.

to cover the broad environmental consequences of an entire program. Thus, the Bureau of Land Management may prepare a programmatic EIS on its coal leasing program, which may then be supplemented by a site specific FONSI or used as the basis for a categorical exclusion. The NIGC could prepare a programmatic EIS on its management contract approval program. Such an EIS would have the advantage of amassing and evaluating information on a nationwide basis of relevance to management contracts for gaming under IGRA. The 36 Final Environmental Assessments completed to date would provide data that could inform the analysis.

With a single programmatic EIS providing definitive data and analysis, a categorical exclusion could be supported or the work of preparing contract-specific environmental documents could be streamlined. The streamlining could take place through what CEQ describes as “tiering,” where information presented and evaluated once need not be repeated in subsequent documents, but can simply be referenced. 42 C.F.R. § 1500.20. Such an approach would save substantial time and money if the NIGC erroneously concludes that it is required to prepare environmental assessments and FONSIs, or even contemplates potential use of EISs for management contracts.

III. Technical Comments.

We look forward to seeing revisions of the manual consistent with the above advice. We also suggest several technical comments that may help tribes and the public better understand their roles and the flow of the NEPA process.

The Draft Manual fails to explicitly provide that the EIS will consider the effect of the proposed action on tribal trust assets or trust resources. It is possible for a proposed gaming facility by one tribe to affect trust assets of another, such as hunting or fishing rights. As described previously in these comments, while there have been no instances of this in the past, this is the only instance, if it were to ever occur, where the NIGC could actually act on environmental information in its management contract approval process. If the NIGC is to conduct evaluations under NEPA, then trust responsibilities should be listed as areas of consideration in the Appendix A list of resource categories. The NIGC has a trust responsibility to protect and preserve these assets and resources from waste and destruction. The section should also contain a provision allowing the tribal proponent of the project necessitating the EIS to waive the need for the EIS to consider the impact of the project on those lands within its jurisdiction.

We have no objections to the list of categorical exclusions themselves, other than the need to add management contract approvals of projects with construction activity to the list if the Commission does not agree a statutory conflict exists. We do have a concern with the NIGC’s method of supporting its conclusions, however. The NIGC’s list of categorical exclusions, which, if approved by the CEQ, are agency actions for which no EA or EIS need be completed or FONSI signed, apparently would contain statements based solely on the opinion of an NIGC official or a conversation of the NIGC official with an unnamed BIA official.

If the NIGC believes that an expert opinion in a matter is needed, it too should solicit the advice of an independent expert and be prepared to name the expert. *See NIGC, Categorical Exclusion Administrative Record, Draft Date: November 30, 2009, available at <http://www.nigc.gov/LinkClick.aspx?fileticket=opFmt3Ay1nI%3d&tabid=719>* (last visited Feb. 2, 2010) (“Mr. Mehaffy relied not only on his own experience, but he also consulted with a senior environmental scientist at the Bureau of Indian Affairs . . .”). If the area of law is clear, citations to established authorities, EPA grants of categorical exclusions, and any appropriate case law should be sufficient; if not, the agency should not be able to rely on its own unchallenged opinion. It is self-serving reasoning such as this that has led the NIGC so far astray in its quest to define the difference between Class II and Class III gaming and impose Minimum Internal Control Standards on Class III gaming that were outside the scope of its statutory authority.

Sections 2.11.1.2 -2.11.1.4 should follow the initial verb tense used in 2.11.1.1 and use gerunds throughout.

Section 2.2 should note that NIGC is required to comply with NEPA and related statutes, not that it is important that the agency comply with them.

The following from 2.4.1.2.1 is an incomplete sentence: “[t]he FONSI must include all mitigation measures identified in the EA and required to avoid, eliminate, or reduce the impacts of the proposed action.” The word “and” should be deleted.

Section 2.7.3 should include in tribal responsibilities that the Tribe shall, in coordination with the NIGC, take necessary steps to ensure the public is made aware of the availability of environmental information on their proposed action and provided an opportunity to comment. Currently, that tribal responsibility is listed as part of section 2.7.5. Tribal responsibilities should also include creating a request for proposal and pre-screening contractors for the EIS so a tribe may submit a list of options to the NIGC.

Figure 4-1 as currently written is confusing in that it appears to leave open the possibility that NIGC might proceed with an action, rather than obtaining an Environmental Impact Statement (EIS), if the Environmental Assessment (EA) leads the NIGC’s NEPA Compliance Officer to determine that a project will have significant impacts on the human environment. Step 10a states that, if impacts are determined to be significant, the responsible NIGC official will proceed to prepare an EIS, and skip Step 11, publication of the final EA and Finding of No Significant Impact (FONSI). Step 10a does not state that the NIGC Official will skip Step 12, wherein the NIGC proceeds with the action and any applicable mitigation and monitoring. Therefore, Step 10a should state “Do not go to Step 11 or 12.” It might be helpful to refer the reader to Figure 5-1, detailing the steps taken in the EIS process.

Section 4.10.1, describing the preferred EA format for the cover page, should reference the name of the subject project rather than the name of the subject gaming facility. The EA may be assessing an associated structure, such as a hotel or parking garage, rather than construction or expansion of the gaming facility itself.

Section 4.10.7 should require that the proponent tribe not only be consulted with, but agree to any mitigation measures in an EA before it is finalized. The tribe, not the NIGC, will have to pay for and implement any mitigation measures and should be given the option of deciding if the mitigation suggested is acceptable or offering other alternatives that will reach the same result. Also, it is unlikely that the NIGC would have the authority to require any mitigating measures.

Section 4.11.5 incorrectly references 40 C.F.R. § 1501.4(c)(2) when it is referring to § 1501.4(e)(2).

Section 5.6.3.1, the EIS Cover sheet, must list the state and county/other jurisdiction of the project, not just the location. 40 C.F.R. § 1502.11(b). Per CEQ regulations, the cover sheet must also include a one paragraph abstract of the project and the date by which comments must be received. *Id.* §§ 1502.11(e)-(f).

Section 5.6.3.8 does not discuss all of the environmental consequences that the CEQ requires be addressed pursuant to its regulations. See 40 C.F.R. §§ 1502.16(c)-(g).

Appendix B § V.3 refers to disagreements between lead and cooperating agencies' point of contact to "mid-level managers." It is best to include specific titles when creating the memorandum of understanding.

Appendix C § C-3 should allow a tribe to rank contractors responding to the request for proposals and submit that list to the NIGC. The NIGC should consult with the Tribe when making a selection, but need not follow the tribe's recommendation.